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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—NO. 455.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased,

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF.

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Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF.

Statement.

This case is before this Court upon a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit to bring before this Court for review a judgment of the Circuit Court of Appeals (R. 28, 29) which affirmed an order of the United States Board of Tax Appeals (R. 17) deciding in favor of the Commissioner that an assessment in the aggregate amount of $9,306.36 should be made against I. L. Phillips, the petitioners' testator, as a transferee of Coombe Garment Company, Inc., as the result of deficiencies aggregating $9,306.36 ascertained against that corporation for the years 1918 and 1919 (R. 8, 9). Upon rendering its judgment the

Circuit Court of Appeals for the Second Circuit wrote an opinion which is reported in 42 Fed. (2d) 177.

Ground Upon Which Jurisdiction Is Invoked.

This Court has brought this proceeding before it by writ of certiorari pursuant to petition filed under Section 240-A of the Judicial Code (28 U. S. C. A. 347-a) and in accordance with the provisions of Sections 1002 and 1003 of the Revenue Act of 1926 (26 U. S. C. A. 1225 and 1226). *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716. The order of the Board of Tax Appeals was entered on April 3d, 1929 (R. 17), and the judgment of the Circuit Court of Appeals was filed June 16th, 1930 (R. 28).

Statement of the Case.

The facts as stipulated by the parties were incorporated in the decision as findings of fact (R. 14-16).

The Coombe Garment Company, Inc., was a Pennsylvania corporation, having its principal place of business in Philadelphia (R. 14). On June 16th, 1919, the Coombe Garment Company filed its income and profits tax return for the calendar year 1918 and on March 6th, 1920, it filed a like return for the calendar year 1919 (R. 14).

In the year 1919 there were eleven stockholders of the Coombe Garment Company, of whom I. L. Phillips, the petitioners' testator, was one, owning 25% of the stock (R. 15). The company had completely liquidated by September 27th, 1919 (R. 14). At the time of the liquidation the outstanding capital stock of the company

was $50,000, represented by 500 shares, each of the par value of $100 (R. 14, 15).

Between July 25th, 1919, and September 27th, 1919, a total amount of $68,558.35 was paid to the stockholders of the Coombe Garment Company, Inc., "in liquidating dividends" (R. 15), but the findings do not state in how many payments or in what amounts or upon what dates these "liquidating dividends" were paid.

In February, 1925, the Commissioner assessed against the corporation an additional tax of $277.75 for the year 1918 and in December, 1924, an additional tax of $9,124.68 for the year 1919 (R. 15). On account of this aggregate of assessment $96.07 has been paid, leaving a total of $9,306.36 which has been assessed against the Coombe Garment Company for the years 1918 and 1919 and which has not been paid (R. 15).

On June 16th, 1926, the Commissioner of Internal Revenue notified I. L. Phillips that he proposed to assess against him the entire amount of this aggregate of $9,306.36 (R. 15, 8-9). By this notice the Commissioner proposed to assess the entire of the unpaid taxes of the Coombe Garment Company against I. L. Phillips, and the Commissioner did not send to any other stockholder as a transferee of the assets of the Coombe Garment Company any similar notice nor make any effort to collect any part of this deficiency of the corporation's tax from any other stockholder (R. 16).

Of the entire assets of the Coombe Garment Company, amounting to $68,558.35, I. L. Phillips received in all $17,139.61 (R. 15) but in what instalments and at what times he received this sum does not appear in the record nor is it found.

Specification of Errors.

The petitioners contend that the Court below erred

(a) In holding that the grant of power to the Commissioner of Internal Revenue by Section 280 of the Revenue Act of 1926 is not unconstitutional as violative of the principle of the separation of powers.

(b) In holding that the grant to the Commissioner by Section 280 does not violate the rights of the alleged transferee under the Fifth Amendment of the Constitution of the United States in that it takes his property without due process of law.

(c) In holding that so far as the liability of an alleged transferee at law is concerned, the grant of power to the Commissioner of Internal Revenue to assess such liability is not violative of the Seventh Amendment of the Constitution of the United States.

(d) In holding that the provisions of Section 280 of the Revenue Act of 1926 do not unconstitutionally delegate to the legislatures of the several states the power to determine the liability of alleged transferees.

(e) In holding that if the assessment against a transferee may be justified as the assessment of a tax, such tax is not unconstitutional for lack of uniformity under the provisions of Article I, Section 8, of the Constitution.

(f) In holding that the amount of the entire tax could be assessed against I. L. Phillips.

Summary of Argument.

In the various stages of this proceeding as well as in numerous discussions relative to the subject of this review, those who have advocated the constitutionality of Section 280 of the Revenue Act of 1926 have proceeded at times upon the theory that the amount assessed was the amount of a tax and at times upon the theory that the amount assessed was what the statute literally calls it, "the liability, at law or in equity, of a transferee of property of a taxpayer". The argument of the petitioners here assumes that the amount attempted to be assessed against I. L. Phillips either was or was not a tax. The argument is that, viewed either way, Section 280 is unconstitutional. The outline of this argument follows:

A. If the amount proposed to be assessed against I. L. Phillips is not a tax but a liability in law or in equity, then Section 280 is unconstitutional, for

(1) The liability of one who receives property of a debtor is dependent upon innumerable questions of law and fact such as have from time immemorial been adjudicated by courts of law and courts of equity, and the determination of such questions is, within the provisions of Article III of the Constitution of the United States, a matter exclusively within the province of the constitutional courts provided that the parties are encompassed within Section 2 of Article III of the Constitution. The grant by the provisions of Section 280 to the Commissioner of Internal Revenue of the power summarily to assess this liability is an unconstitutional delegation of judicial power

to an administrative officer and offends against the constitutional principles of the separation of powers.

(2) The liability in law or in equity of a transferee of the property of a taxpayer is not a liability to the sovereign of such character as has ever either in this country or in England, at least since the days of Magna Charta, been enforced by execution or summary process before the amount thereof was determined by a court of record. Due process of law requires that the amount of this liability be first ascertained in a proper court before execution or warrant for the collection thereof should issue.

(3) The liability of the transferee of a taxpayer in many cases is a liability at law. Where the amount of such liability exceeds $20, the transferee is entitled to a trial by jury under the Seventh Amendment to the Constitution of the United States. As to liabilities at law, therefore, Section 280 is unconstitutional. So large a number of the cases, therefore, in which the section might operate would be barred by reason of the Seventh Amendment that the entire of Section 280 should be declared unconstitutional.

B. If the amount which the Commissioner assessed against I. L. Phillips is a tax, then Section 280 is unconstitutional for

(1) It imposes a tax liability which is neither apportioned among the several states according to their respective numbers, in accordance with Article I, Section 2, of the Constitution, nor uniform throughout the United States, in accordance with

the provisions of Article I, Section 8, of the Constitution. The attempt to treat the assessment against a transferee as a direct tax would be so abortive by reason of the want of apportionment that we assume no effort would be made in that direction. It may be contended, however, that, being based upon the income of the original taxpayer, the assessment against the transferee might be justified as an income tax. Passing over the proposition that it would be difficult to uphold such an income tax for the reason that it is not based upon the income of him against whom it is assessed, such tax would still be wanting in validity for the reason that it would not be uniform throughout the United States. The liability in law or in equity of a transferee of the property of a corporation is normally determined according to the law of the State which created the corporation. It will be demonstrated that there is great divergence in the laws of the several states as to the liability of a transferee of the property of a corporation. Hence, there is utter want of uniformity in the application of Section 280 if it be viewed as a tax.

(2) Section 280 delegates to the legislatures of the several states the power to determine the amount of the liability which will thus be assessed. As noted above under A (1), the amount of the liability is determined by the law of the State of incorporation. This law can be changed from time to time and indeed since the adoption of the 1926 Revenue Act in some cases has been changed by the legislatures of the several states. As it is changed, it will govern the liability of transferees who receive transfers thereafter. Thus Congress

has not fixed the amount of such liability but has delegated to the legislatures of the several states the power to fix it.

The argument is further, that if general equity principles should be held to govern then the liability of any stockholder should be limited to his *pro rata* share of the tax; and further that the findings of fact in the record support only a *pro rata* liability.

Finally, we contend that the arguments of unconstitutionality have not been waived by the appeal to the Board of Tax Appeals.

The Statute Involved.

The principal statute involved in this case is Section 280 of the Revenue Act of 1926 (26 U. S. C. A. 1069). This statute, so far as here material, is as follows:

> "(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection and the provisions prohibiting claims and suits for refunds).
>
> (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter or by any prior income, excess-profits, or War-Profits Tax Act.

(2) The liability of a fiduciary under section 192 of Title 31 in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax. * * *"

Argument.

POINT I.

Section 280 of the Revenue Act of 1926 violates the constitutional principle of the separation of powers.

In this point we proceed upon the theory that the liability against I. L. Phillips is not a tax but what the statute itself calls it and that which the notice sent by the Commissioner to Mr. Phillips obviously intended it to be, *i. e.*, the amount of Mr. Phillips' liability in law or in equity for a tax theretofore assessed against, but not collected from, the Coombe Garment Company, Inc.

The determination of such liability as here assessed against Phillips inherently involves a judicial determination of facts and a judicial determination of the laws which are to be applied and a judicial construction of those laws, and that such determination and construction is so fundamentally a matter of judicial concern that the Congress cannot, consistently with our constitutional system, vest such determination and construction in an administrative officer such as the Commissioner of Internal Revenue.

Perhaps at the outset we might consider some of the factors which the Commissioner must necessarily have

determined in the case of the assessment against Mr. Phillips. That these factors are all involved as a matter of law more fully appears in later points. The record discloses that the petitioners, as executors of Mr. Phillips are residents of the State of New York (R. 14). The record does not disclose where Mr. Phillips lived at the date on which the liability is purported to be assessed. The record discloses that the Coombe Garment Company is a Pennsylvania corporation (R. 14) and that Mr. Phillips received in several instalments the sum of $17,139.61 (R. 15). In what instalments he received these moneys or on what dates does not appear. It does not appear from the record whether Mr. Phillips received all of his instalments before the amount of the assets of the company were reduced below the amount of its liabilities. Certainly, if all distributions were made *pro rata*, the major portion of the distribution to Phillips was received before the corporation was reduced to a state of insolvency.

Upon this state of the record the Commissioner of Internal Revenue was required to decide in the first place whether the controlling law was a Federal law, the law of the state of Mr. Phillips' domicile or the law of the state of incorporation of the Coombe Garment Company. Assuming that the Commissioner decided that the governing law was the law of the state of incorporation, the Commissioner must then have determined what the law of Pennsylvania on the subject was; to what extent its statute law applied as creating a liability in law and to what extent any equitable liability survived the adoption of the statute; whether the limitation of time placed upon the stockholders' liability in Pennsylvania supersedes the limitation of time attempted to be provided in

the revenue laws of the United States. These are illustrative questions of law and of fact which are necessarily incident to the determination of the liability of a transferee in so simple a case as that presented here. It requires only a reference to adjudicated cases to afford convincing evidence that in most transferee cases the problems above suggested would be multiplied manifold. (*Owensboro etc. Co.* v. *Lucas*, 18 Fed. (2d) 798.)

Suppose a case of a transferee of the corporation involved in the case of *Thomas* v. *Matthiessen*, 232 U. S. 221. There the Commissioner would have to determine, in addition to all of the foregoing questions, whether he was entitled to the status of a California creditor or an Arizona creditor, and accordingly whether he was subject to the Arizona limitations of liability or the California provisions for liability. This determination, under the rulings of this Court, would also involve a question as to whether the particular stockholder involved had ever agreed to the corporation's doing business in California thus subjecting himself to California liability. To all these questions in many cases there will be added the difficulty which arises where the transferee gave value for the transfer. There the question of the amount of the value given and its adequacy must also be determined by the Commissioner of Internal Revenue. Likewise, it has been held by this Court (*United States* v. *Howland*, 4 Wheat (17 U. S.) 108), that where a claim is made by the United States against the transferee of a taxpayer and the transferee claims that the taxpayer was indebted to him, the United States must submit to an accounting between itself, the taxpayer and his transferee so that it may be determined first, how much the taxpayer owed the transferee, and secondly, how much the surplus above

this debt is in the hands of the transferee. This tripartite controversy, Section 280 places in the hands of the Commissioner of Internal Revenue.

Next we consider the effect of the statutes of the various states which affect the liability of a stockholder who receives property of a corporation. For use in connection with a later point we have attached to this brief as appendices an outline of the various state statutes affecting this liability. We call particular attention to the statute of Louisiana. Under this statute, before the stockholder can be resorted to by any creditor certain rights against the directors who made the distribution must first be exhausted. In exhausting these rights it must be determined what the intent and *scienter* of the various directors in making the distribution had been. These questions of intent and guilty knowledge are also, as we shall see in a later point, confided by Section 280 to the Commissioner of Internal Revenue for determination, and as well, under the Idaho law as whether the publication of notice was in accordance with the statute so that the period of limitations governing the filing of claims would be effective.

We believe that the above illustrations are sufficient to demonstrate that Section 280 clearly involves an invalid delegation of judicial power to an administrative officer.

The Constitution of the United States provides as follows:

"ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and

in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; * * *."

The Constitution does not contain any mandatory provision that the executive, judicial and legislative branches of our government should be kept separate, but it has been determined judicially that such is the intendment of the Constitution and that a law to the contrary is invalid. Thus this Court in *Evans* v. *Gore*, 253 U. S. 245, said:

"The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers,—the legislative, the executive and the judicial,—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others,

> and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative."

Particularly has it been held that the entire of the judicial power of the United States must be vested in the courts set up by and under Article III of the Constitution. Thus, in *Martin* v. *Hunter*, 14 U. S. (1 Wheat.) 304, 328, Mr. Justice Story said:

> "If, then, it is a duty of Congress to vest the judicial power of the United States, it is the duty to vest the whole judicial power, the language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the juris diction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others."

The same thought was expressed in a different way by Mr. Justice Curtiss in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, a case much relied upon by the Government:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not the subject of judicial determination."

Such being the law, it must then follow that if the de-

termination of the questions above suggested is within the judicial power of the United States it must be vested in the courts of the United States and cannot be constitutionally vested in any other body or officer.

The application of this general principle to Section 280 of the Revenue Act was upheld in *Owensboro, etc. Co.* v. *Lucas*, 18 Fed. (2d) 798 (D. C. W. D. Ky.); *Mid-Continent Petroleum* v. *Alexander*, 35 Fed. (2d) 43 (D. C. W. D. Okla.). This principle, however, has been combatted in government arguments, publications of commentators and in the opinion of the Court below, principally upon two grounds. The first ground is that discretionary power of various kinds has been delegated with the sanction of this Court in other cases to commissions, boards and executive officers. The second ground is that Section 280 goes no further than did the statute involved in the case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272. We shall examine these two contentions successively.

No True Constitutional Judicial Power Can Be Delegated to an Administrative Body.

The argument frequently advanced that the powers vested in the Commissioner of Internal Revenue here are analogous to those vested by the Congress in the Federal Trade Commission, Interstate Commerce Commission, the Court of Customs Appeals and the like, is based upon the conception that this Court, in its recognition of the powers of those and similar bodies, has countenanced a whittling away of the body of judicial powers confided by the Constitution to the Supreme Court and the inferior courts created by Congress under

the Third Article of the Constitution; that the border between powers which are judicial on the one hand and legislative or administrative on the other has become so uncertain and indefinite that any given power may be placed on the one side or the other of the border as governmental convenience may require. (29 Columbia Law Review, 1052). We conceive that this point of view presents an improper understanding of the various decisions of this Court and that this Court has never departed from the rule laid down by Mr. Justice Story in *Martin* v. *Hunter, supra.*

There can be no doubt, of course, that the Congress, in the exercise of its powers to regulate interstate commerce and to regulate foreign commerce, to regulate immigration and the like, may, in the execution of those powers, employ agencies whose functions are seemingly judicial or quasi-judicial. *Ex parte Bakelite Corp.,* 279 U. S. 438. The powers which these bodies exercise, however, are merely the powers which the Congress itself might exercise were it practicable for that body to attend to the details of administration covering the entire area of the United States. As a matter of convenience, Congress does, through its agents, that which it could do as a body.

These agencies, however, do not perform judicial functions as those functions are defined and encompassed in and by the Third Article of the Constitution. This distinction between the legislative function, which is a forward-looking function, and the judicial function, which is a determination based upon that which is or has been, is clearly pointed out by this Court in *Keller* v. *Potomac Electric Co.,* 261 U. S. 428, where this Court held itself incapable, under the Constitution, of review-

ing the discretion exercised by the public utilities commission of the District of Columbia. In so refusing, the Court used this language:

> *"Such legislative or administrative jurisdiction, it is well settled, cannot be conferred on this Court either directly or by appeal.* The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day speaking for the Court in *Muskrat* v. *United States,* 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States, ordained and established by Congress under and by virtue of the third article of the Constitution, is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court, without real parties or a real case, *or to administrative or legislative issues or controversies."* (Italics ours.)

We also refer in this connection to *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452. In such case this Court and the constitutional courts can go no further than to determine whether the public utility commission has exceeded its statutory or constitutional powers or has made a mistake of law. The true distinction in such case between the legislative power and the judicial power was laid down in *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to

> exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind * * *."

The distinction between the two powers is possibly most clearly pointed by a comparison of the determinations made by this Court in *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, and *Wong Wing* v. *United States,* 163 U. S. 228. In the one case this Court held it competent for administrative officers to penalize steamship companies which had brought to this country for entry, aliens determined upon a medical examination to be afflicted with a loathsome disease, contrary to the statute; whereas in the other it refused to sanction as constitutional a law which permitted a United States Commissioner to imprison under a criminal statute and without a trial by jury Chinese found to be unlawfully within the United States. In the first case the Congress itself could have refused admittance to an alien and could have penalized anyone who attempted to bring him in contrary to the will of the Congress. In the latter case it was competent for the Congress to pass a statute defining a crime, but a conviction of a crime is a function clearly judicial, encompassed by the final clause of Section 2, Article III, of the Constitution and could not be legislatively or administratively performed.

In conformity with this distinction this Court has constantly refused to pass upon questions involving the exercise of judgment and discretion, seemingly judicial

in their character, but in a sphere which under the Constitution is exclusively one for the legislature to perform. Thus in *Hayburn's Case*, 2 Dall. 410, and in *United States* v. *Ferreira*, 13 How. (54 U. S.) 40, this Court refused to intervene in cases where the Congress or administrative officers had the final right of determination, the judgments of the courts being merely advisory in their nature.

Similarly, where truly judicial questions arise under the laws of the United States but by virtue of the character of the parties involved or the nature of the questions to be presented, the matters are not cognizable by the constitutional courts of the United States, it is competent for the Congress to set up courts, designated legislative courts, which may dispose of those questions. A primary example of this type of jurisdiction is the Court of Claims which, as was pointed out by this Court in *Ex parte Bakelite Corp.*, 279 U. S. 438, is truly a legislative court. The United States being a sovereign has the right to refuse to be sued. If it gives its consent it can give its consent under such conditions as it may impose and it may vest the determination of any questions relative to claims against it in any body it may set up for that purpose. It may make the determinations of such court subject to subsequent administrative action as well as subsequent legislative action. If it does so, however, there is no case or controversy under the Third Article of the Constitution such as will permit this Court upon appeal to review the determination. *Gordon* v. *United States*, 2 Wall. 561 (also the opinion written by Mr. Chief Justice Taney shortly before his death and before decision of the case, which is reported at 117 U. S. 697). This distinction between the legislative court which can

be made subject to all manner of restrictions and the constitutional court upon which the Congress cannot impose the duty of passing upon matters not truly within the Third Article of the Constitution, is clearly pointed out by a comparison of the determination in *Gordon* v. *United States, supra,* and in *United States* v. *Jones,* 119 U. S. 477, where it was pointed out that this Court was vested with appellate jurisdiction of controversies arising in the Court of Claims once the Congress had made the determination reached by that Court final and no longer subject to executive or administrative action.

Similar illustrations are found in the territorial courts which exercise, under the mandate from Congress, a judicial function but not a judicial function under the Third Article of the Constitution but rather under the Third Section of Article IV which gives Congress the power to "make all needful Rules and Regulations, respecting the Territory or other property belonging to the United States".

The petitioners make no question, therefore, as to the right of the Congress to vest with judicial or quasi-judicial powers and functions bodies or courts other than those erected pursuant to Article III of the Constitution of the United States. The petitioners do contend, however, that the only type of such judicial or quasi-judicial functions which the Congress can vest in bodies other than the constitutional courts are those which, because of the character of the questions involved, the character of the parties involved or the territorial jurisdiction concerned, were such as to make the matters incapable of cognizance by the constitutional courts. Thus, if no case or controversy is involved, the Congress

is free to impose and, indeed, must impose the duty of any determination upon a legislative as distinguished from a constitutional court or body; or if a power is involved which the Congress has the exclusive right to exercise it may exercise it through any legislative as distinguished from a constitutional court or body. And likewise, the reverse of this principle must be true and, we contend, is definitely established by the authorities to which we have referred above as well as other numerous decisions of this Court, to wit, that if there be a true case or controversy and if that case or controversy involve the Constitution or the laws of the United States, and are of such type as are usually included within the general jurisdiction of a court of law or a court of equity, and if the parties to the controversy be within the classes specified in Section 2 of Article III of the Constitution of the United States, then within the principle laid down by Mr. Justice Story in *Martin* v. *Hunter, supra,* the Congress is incapable of taking such case or controversy away.

The test to be applied, therefore, within the authorities is this: *If there be a right or liability which depends upon or arises under the Constitution or the laws of the United States, and if the parties are within the classes of parties mentioned in Section 2 of Article III of the Constitution of the United States, and if such case or controversy is cognizable by courts of law or equity as legal and equitable jurisdiction existed at the time of the adoption of the Constitution of the United States, without any further legislative mandate, then the parties whose rights or liabilities are involved have a constitutional right to a judicial determination by a constitutional court.*

In the case at bar there can be no doubt but that a claim by the government against the transferee of the property of a taxpayer is of such character that the constitutional courts of equity would assume jurisdiction merely by virtue of their general character as a court of equity and without any further legislative mandate or power. Proof of this contention is established by the decision of Mr. Chief Justice Marshall in *United States v. Howland*, 4 Wheat. (17 U. S.) 108. In that case (to which reference has already and will hereafter be made), this Court had before it a discussion of the nature of a claim by the United States against the transferees of a payer of customs duties, and the Learned Chief Justice determined that the nature of this case or controversy is in the nature of a suit for an accounting which clearly is a subject matter for equitable jurisdiction quite without any further legislative mandate. Chief Justice Marshall said:

> "But the United States are creditors of Shoemaker & Travers, and have a right as creditors, to proceed against their property in the hands of Howland and Allen. They have a right to so much of that property as remains, after the debt due to Howland and Allen shall be satisfied. But to ascertain this amount, an account between Howland and Allen and the debtors to the United States should be taken, and the persons against whom the account is to be taken, should be parties to the suit."

Indeed, our contention might be demonstrated in the form of syllogism, as follows:

> THIS COURT AND THE OTHER CONSTITUTIONAL COURTS WILL NOT TAKE COGNIZANCE OF MATTERS ADMINISTRATIVE IN THEIR CHARACTER (*Keller* v.

Potomac Electric Co., 261 U. S. 428). THIS COURT AND THE OTHER CONSTITUTIONAL COURTS HAVE TAKEN COGNIZANCE OF A CLAIM BY THE UNITED STATES AGAINST THE TRANSFEREE OF A TAXPAYER (*United States* v. *Howland*, 4 WHEAT. (17 U. S.) 108). THEREFORE, A CLAIM BY THE UNITED STATES AGAINST A TAXPAYER IS NOT A SUBJECT OF ADMINISTRATIVE DETERMINATION.

Or, put otherwise:

THE CONGRESS CANNOT TAKE FROM THE COURTS OF THE UNITED STATES A MATTER WHICH IS ONE OF CONSTITUTIONAL JUDICIAL COGNIZANCE (*Martin* v. *Hunter*, 1 WHEAT. (14 U. S.) 304). A CLAIM BY THE UNITED STATES AGAINST THE TRANSFEREE OF A TAXPAYER IS A MATTER OF JUDICIAL COGNIZANCE (*United States* v. *Howland*, 4 WHEAT. (17 U. S.) 108). THEREFORE, THE CONGRESS CANNOT TAKE FROM THE CONSTITUTIONAL COURTS OF THE UNITED STATES THE POWER TO PASS UPON THE CLAIM OF THE UNITED STATES AGAINST THE TRANSFEREE OF A TAXPAYER.

Nor does it oviate these results that the determination of the Commissioner is subject to appeal. The fact is that he does under Section 280 render a final and self-executing determination. In this regard he is exercising exactly the type of jurisdiction which is required of the constitutional courts. Thus in the opinion of Mr. Chief Justice Taney in *Gordon* v. *United States*, 117 U. S. 697, 702, to which reference has already been made, in defining the judgment required of a lower court in order to be appealable to the Supreme Court of the United States, it was said:

"The inferior court, therefore, from which the appeal is taken must be a judicial tribunal au-

> thorized to render a judgment which will bind the rights of the parties litigating before it, *unless appealed from and upon which the appropriate process of execution may be issued by the court to carry it into effect.*" (Italics ours.)

In conclusion we merely cite to the Court instances in which it has been held that congressional legislation is invalid because it attempted to vest judicial power in legislative or executive officers. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *United States* v. *New River Collieries,* 262 U. S. 341; *National City Bank* v. *United States,* 275 Fed. 855, affd. 281 Fed. 754.

The Holding in Murray's Lessee v. *Hoboken Does Not Support the Constitutionality of Section 280.*

The Court below (R. 25, 26) based its determination that the principle of the separation of powers is not violated by Section 280 upon the opinion of this Court in *Murray's Lessee* v. *Hoboken Land, etc., Co.,* 18 How. (59 U. S.) 272. That case, however, seems to afford no basis for such decision. There the question was as to the constitutionality of summary process against a collector of United States revenues on account of a shortage in his accounts. This Court was at considerable pains to examine into the history of such process and sustained the process on the ground that historically those who assume the position of receivers of revenue have, in England and in this country, subjected themselves to such process. The holding of the Court is stated in the following language:

> "This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due

from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers 'the law of the land' authorize the employment of auditors and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question."

In other words the decision in the *Murray's Lessee* case was based upon the peculiar relationship of collector of revenue to his government. The Court, indeed, might well, it seems, have placed the decision on the simpler ground that the statute authorizing the summary inquisition and warrant of distress, having been in contemplation of the Government and of the revenue collector at the time when he assumed his task as revenue collector, it became a part of the contract between the parties and he, in assuming his office, agreed to have his rights as against the Government determined in this summary way. Likewise, of course, anyone contracting with the Government may agree that disputes between them may be determined by any body of arbitrators and in any manner. The agreement of the parties would then be selecting the forum. The Constitution, of course, does not limit contracting parties in this particular. It is only when the Congress, contrary to the will of an individual, compels him to yield to a determination judicial in its character, by an administrative officer, that there exists a right to complain.

Nor does it seem that the Court below was correct in its statement (R. 26) that "the Commissioner's determination of the transferee's liability, and the extent of it, is not different in kind from the auditing of the amount due from the defaulting collector in *Murray's Lessee*". The auditing of the collector's account was merely a matter of determining receipts and authorized disbursements. Here, as shown at the beginning of this Point, complicated questions of law, of fact and of equity jurisdiction may intervene. Under Point II we shall consider briefly that the summary process cannot be justified as due process of law under the case of *Murray's Lessee*. Here we believe that the demonstration has been conclusive that the case of *Murray's Lessee* does not uphold Section 280 against attack as a violation of the principle of the separation of powers.

POINT II.

Section 280 of the Revenue Act of 1926 offends against the due process clause of the Fifth Amendment.

The liability of a transferee of a taxpayer to the Government is in the nature of a debt. As Chief Justice Marshall in *United States* v. *Howland*, 4 Wheat. (17 U. S.) 108, said:

> "But the United States are creditors of Shoemaker & Travers, and have a right, as creditors, to proceed against their property in the hands of Howland and Allen."

As the debtor in such case, of course, is indebted to the sovereign, the sovereign has such remedies as are con-

sistent with the due process clause (the separation of powers not here being taken into account). The due process clause assures to persons within the United States those protections against drastic and summary action on the part of the Government which were assured to the inhabitants of England and of the colonies at the time when the Constitution was adopted. In *Hurtado* v. *California,* 110 U. S. 516, the Court said:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues * * *. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.
>
> It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they

must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."

This Court in the *Murray's Lessee* case, 18 How. (59 U. S.). 272, examined the summary methods for the collection of debts due to the Crown, which had been used by the Crown of England prior to the adoption of Magna Charta, and thereupon remarked:

> "That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: 'We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt'."

In Chitty's Prerogatives of the Crown, page 265, it is said:

> "It would be contrary to the first principles of law and justice, to issue process of execution before it is ascertained what debt is due to the Crown, and such debt becomes a debt on record. It may, therefore, be laid down, as a general rule, that till the debt, not being *per se* of record, be ascertained, and becomes a record by a commission and proceeding thereon, the Crown is not entitled to process of execution, unless in cases

> of danger, or insolvency, when an immediate extent may be issued subject to the rules which will be mentioned. The Crown has no election on this subject. It is bound strictly by this principle.
>
> With respect to the question, what is a debt of record? it seems, that at common law there is no exception in the case of a Crown debt from the general rules prevalent on this subject in common cases. There are, however, some few exceptions by statute."

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this Court had before it a statute of Florida which authorized a judgment-creditor of a corporation whose execution against the corporation had been returned unsatisfied to issue execution against the property of a stockholder to the extent of his unpaid subscription. This Court held such statute unconstitutional, as not affording due process of law under the Fourteenth Amendment, saying:

> "But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

The only answer which the Government thus far appears to have been able to make to this contention is that, as shown by the Congressional Record, it affords a more efficient and rapid method of collection in the amounts

of these liabilities. The same argument could be made with regard to the collection of all debts owing to the United States; and doubtless the sum total of such debts would amount to as handsome a figure as the total which is likely to be collected by application of the provisions of Section 280. The large tax liabilities resulting from war-time profits which may have been rendered difficult of collection by transfers is also urged. A weakening of the constitutional guarantees to meet this purely temporary condition hardly seems warranted.

What drastic provisions for imposition of summary penalties might be constitutionally justified in the case of stockholders or directors of a corporation who distribute its assets for the purpose of working a fraud upon the taxing powers of the United States is not here in question. There is no pretense that this corporation which liquidated its business, turned it all into cash and distributed it among its stockholders was actuated by any such purpose. There is no finding or suggestion of fraud. There is no requisite under Section 280 that any improper motive or purpose be intended or accomplished. The section has its universal application to all cases of transfer no matter how innocent. To innocent transferees the ordinary processes of the courts should be held open.

POINT III.

Section 280 of the Revenue Act of 1926 offends against the Seventh Amendment of the Consitution.

As we have seen, the provisions of Section 280 authorize the Commissioner to assess against a transferee his liability at law as well as his liability in equity. The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Of course, the amount here in controversy exceeds $20. It also appears to be true that the liability of a stockholder of a Pennsylvania corporation who receives the property of the corporation in liquidation is a liability at law and fixed by statute. Thus it is provided in the Corporation Act of 1874, Section 39, cl. iv.:

> "If any part of the capital stock of a company is withdrawn and refunded to the stockholders before the payment of all the debts of the company contracted previously to the recording of a copy of the vote for that purpose in the office of the Recorder of Deeds, as prescribed in the preceding section, all the stockholders of the company shall be jointly and severally liable for the payment of such debts".

And in Section 15 it is in part provided as follows:

> "But no stockholder shall be personally liable for payment of any debt contracted by any such

corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders, within six months after such debt shall have become due".

There is nothing in this joint and several liability of the stockholders which requires the interposition of a court of equity, and the liability pursuant to the statute would seem to be at law inasmuch as the law affords a plain, adequate and complete remedy. As will appear from the appendices to this brief, numerous of the other states have statutory provisions imposing a legal liability upon stockholders in distribution. By the plain mandate of the Seventh Amendment such stockholders are entitled to have their liability determined by a jury. This point is noted in a learned discussion of the subject by Mr. O. John Rogge of the Chicago Bar, appearing in 27 Michigan Law Review 39, at page 64, where, in discussing the remedies against a transferee which exist independently of Section 280, he says:

> "Some of the proceedings will be in equity, as for example, in cases of fraudulent conveyances, and generally where stockholders receive the assets of a corporation which has not paid its debts including taxes, or where an attempt is made to follow the *res;* while others will be at law, as, for example, actions for injuring, destroying or passing on property subject to the lien, and actions against transferees who assume to pay the tax. In the event that the action is at law and is brought in the federal courts the transferee is entitled by the Seventh Amendment, to a jury trial if the value in controversy exceeds $20."

We believe that it is clear that the intent of Congress was to include in Section 280 all liabilities of transferees whether in law or in equity. If the section is unconstitutional as to the great body of cases where the liability is at law, it should be declared unconstitutional in its entirety as there is no evidence that the liability at equity would have been taken into the section alone if all legal liability were excluded. *Pollock* v. *Farmers Loan and Trust Co.*, 158 U. S. 601; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *Spraigue* v. *Thompson*, 118 U. S. 90, 95.

POINT IV.

If the assessment by the Commissioner be construed as a tax, then the assessment is unconstitutional for want of uniformity.

The liability which the Commissioner is authorized to assess pursuant to the provisions of Section 280 of the Revenue Act of 1926 has been analogized in some of the cases to a tax liability. Mr. Justice Sutherland in *United States* v. *Updike*, 281 U. S. 489, said:

> "Indeed, when used to connote the payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

We urge that the liability is not a tax liability but rather that which it is declared by the statute to be, an ordinary liability at law or in equity. Indeed, that

is the position which the Government took in the *Updike* case. The *Updike* case did not declare the liability was one for a tax and with the holding of the *Updike* case the petitioners in this proceeding are in entire accord. We foresee that probably the Government may here contend, however, that the liability is a tax and therefore all of the summary remedies for tax collection may be constitutionally justified. If it is a tax, it would seem to be a direct tax and not being apportioned offends against Article I, Section 2 of the Constitution. The Government will therefore probably attempt to support the statutes as imposing an income tax.

Passing over the proposition that the tax as against Mr. Phillips is not one based on his income and therefore scarcely justified by the Sixteenth Amendment, we may consider it as a tax upon Mr. Phillips, somehow calculated upon the earnings of the Coombe Garment Company, Inc. of which he was a stockholder. None the less, the tax would violate the Constitution because of its utter want of uniformity. The Constitution by Article I, Section 2, demands that direct taxes shall be apportioned among the states according to their respective numbers. Article I, Section 8, demands that duties, imposts and excises shall be uniform throughout the United States. In *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S. 601, this Court held that taxes upon the income of real and personal property, being in effect taxes upon that property itself, were direct taxes and therefore were required to be apportioned among the several states in accordance with their respective numbers. The plain intimation of the Court's decision was that taxes upon incomes derived from business, occupations and professions were excises and

therefore were required to be uniform throughout the United States. With the adoption of the Sixteenth Amendment there might have been some doubt that taxes upon the income derived from real and personal property were required to be uniform throughout the United States, but no one of course, could doubt, in view of the holding in the *Pollock* case, that income derived from such businesses as that of the Coombe Garment Company, Inc., would be in the nature of an excise and would be required to be uniform throughout the United States.

The question came before this Court in *Brushaber* v. *Union Pacific Railroad,* 240 U. S. 1, 18, 19, and it was there held that the effect of the Sixteenth Amendment was to eliminate all distinctions among incomes, depending upon the sources from which they were derived and that the taxes upon all incomes were to be treated as excises and therefore required to be uniform throughout the United States pursuant to the provisions of Article I, Section 8 of the Constitution.

It should therefore follow that if the assessment made against Mr. Phillips is to be treated in some manner as an income tax, then that assessment must be of such nature that it would be uniform throughout the United States. If it can be demonstrated that there is lack of geographical uniformity among such assessments, then they would offend against the provisions of Article I, Section 8 of the Constitution of the United States. We also refer to *Bowers* v. *Kerbaugh,* 271 U. S. 170, 173, 174; *Bromley* v. *McCaughn,* 280 U. S. 124, 135, 138; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 112, 113; *Peck* v. *Lowe,* 247 U. S. 165, 172.

It is recognized that the liability of transferee stockholders of a corporation depends as a matter of the conflict of laws upon the law of the state of incorporation with certain exceptions hereafter to be noted. Thus this Court in *Glenn* v. *Liggett*, 135 U. S. 533, in speaking of a stockholder's liability, said:

> "The rights of the parties in the present case must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to the stock were made."

In *Bernheimer* v. *Converse*, 206 U. S. 516, this Court said, at page 533:

> "By becoming a member of a Minnesota corporation and assuming the liability attaching to such membership, he became subject to such regulations as the state might make to lawfully render the liability effectual."

The Court is also referred to *Converse* v. *Hamilton*, 224 U. S. 243; *Flash* v. *Conn*, 109 U. S. 371.

To determine, then, what is the liability in law or in equity of transferee stockholders of a corporation, it becomes necessary to examine the statute and common law of the forty-eight states. As we shall presently see, there is the utmost lack of uniformity in the laws of the several states with regard to this liability. We shall also consider briefly the divergence among the states as to the liability of a stockholder who merely receives dividends from a corporation which impair its capital at the time when the corporation is, nevertheless, solvent. We shall not consider or discuss the possible

divergence in the views of the several states as to the liability of innumerable other types of transferees in the belief that if in these two classes the liability is not uniform, Section 280 cannot be sustained as imposing a tax upon income.

We have attached to this brief as appendices a review of the statutory provisions of many of the states which prescribe the liabilities of stockholders of corporations organized thereunder. These statutory provisions have been gathered from the 1931 edition of the Corporation Manual. We believe that a mere reference to this data is convincing without more, that the assessment of the statutory liability of a transferee stockholder is the assessment of a liability which is lacking in uniformity to the most extreme degree. We here will refer merely to the striking contrast between the liability of such transferee stockholders under the laws of Michigan, Louisiana and Connecticut.

In Michigan the statutory provision is as follows:

> "If the capital stock of any corporation shall be withdrawn, and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be jointly and severally liable to any creditor of such corporation, in an action founded on this statute, to the amount of the sum refunded to him or them respectively" (Public Acts 1921, Act 84, Part 2, C. 3, Section 1). 1931 Corporation Manual, 638.

In Louisiana the provision is as follows:

> "If any dividend shall be paid in violation

of Section 24, or if any other unlawful distribution, payment or return of assets be made to shareholders: I. The directors who knowingly, or without exercising that diligence, care and skill which ordinarily prudent men in like positions would exercise under similar conditions, voted in favor thereof, shall be liable jointly and severally to creditors of the corporation in an amount equal to the amount of the dividends so paid and the distribution, payment or return of assets so made. II. Every shareholder who receives any such dividend or any such distribution, payment or return of assets shall in the following instances be individually liable to the corporation in an amount equal to the amount so received by him:" (thereafter follow conditions precedent to the maintenance of an action against the stockholder) (Laws of 1928, Act 250, Section 27). 1931 Corporation Manual, 502, 503.

In Connecticut the provision is as follows:

"In case any distribution or other disposition of the assets of the corporation involved in or resulting from such reduction shall render the corporation insolvent, the stockholders voting in favor thereof shall be jointly and severally liable, to the amount so distributed or disposed of, for all debts of the corporation existing at the time of such vote, after judgment had been obtained against such corporation and execution has been returned unsatisfied" (G. S., Section 3420). 1931 Corporation Manual, 176.

So also is there utter lack of uniformity with respect to the liability of stockholders who receive dividends from the corporation which impair its capital but which

none the less do not render the corporation insolvent. In one group of states (and this is also the Federal rule) it is held that such dividends do not render the stockholder liable to the creditors of the corporation as the trust fund theory does not begin to apply until the corporation has become insolvent. *McDonald* v. *Williams*, 174 U. S. 397; *Carlisle* v. *Ottley*, 143 Ga. 797. Other states hold that the stockholder receiving such dividend is liable irrespective of insolvency. *Mackall* v. *Pocock*, 136 Minn. 8. A compendium of the cases illustrative of this divergence appears in a note in L. R. A., 1917 C. 397.

Enough has, we believe, been shown to demonstrate the utter inequality among the several states of the liability in law or in equity of transferee stockholders of corporations. Such want of uniformity renders any justification of Section 280 of the Revenue Act of 1926 as a taxing statute impossible.

POINT V.

Section 280 of the Revenue Act of 1926 is unconstitutional as a delegation by the Congress of the taxing power to the Legislatures of the several states.

Under this point we shall again assume that an effort will be made to justify Section 280 as a taxing statute. Under the authorities cited in Point IV, it is obvious that the liability in law or in equity of a transferee stockholder of a corporation depends upon the law of the state of incorporation. If the Congress by Section 280 intended to authorize the Commissioner to assess as a tax the amount of the liability of a stockholder trans-

feree, it thereby authorized him to assess such liability as might be from time to time fixed by the statutes of the forty-eight states. Such statutes are subject to repeated amendments by the respective legislatures and the liability of the stockholder would, under most state constitutions, depend upon the statutes in force at the time when the respective transfers took place. *cf. Bernheimer* v. *Converse*, 206 U. S. 516.

The taxing power is a legislative power. Constitution of the United States, Article I, Section 8. It is unconstitutional for any legislative body to delegate its legislative functions to the legislature of another jurisdiction. Although our research has disclosed no case in this Court upon the subject, the Courts of several states have declared this to be an axiomatic proposition of constitutional law. In *Moore* v. *Allen & Grant*, 30 Ky. 651, the Court of Appeals of Kentucky said:

> "The legislative authority of Congress cannot be delegated to the legislatures of the states. The power confided to members of Congress is a personal trust, which cannot be transferred by them. When called on to account to their constituents for their conduct, it would be at war with our whole system to excuse them upon the ground that they had delegated their powers to the legislature of a state."

In the *Opinion of the Justices*, 239 Mass. 606, the Supreme Judicial Court of Massachusetts had before it a statute of that State which defined intoxicating liquors by reference to definitions which might thereafter be adopted in national legislation. The Court held that

this reference amounted to an unconstitutional delegation of legislative powers, saying:

> "We are of opinion that legislation of that nature would be contrary to the constitution of this commonwealth. Legislative power is vested exclusively in the general Court except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government to republican institutions for the representatives of the people to abdicate their exclusive privileges and obligation to enact laws * * * As already has been stated, no statute would be valid whereby it should be attempted to make operative as a statute of this commonwealth such test, standard, difference or rule to be enacted or adopted in the future."

We also refer the Court to *State* v. *Vino Medical Co.*, 121 Me. 138.

POINT VI.

In no event should the assessment here exceed Mr. Phillips' *pro rata* share of the liability.

If it be sought to avoid the effect of the rule respecting conflict of laws, to which reference has been made in the preceding points, on the theory that the United States has a general equitable right upon trust doctrines to follow the assets of a corporation irrespective of state

statutes, and if it be determined that the doctrines of separation of powers and due process of law do not here preclude the assessment of a liability, then the liability should not exceed such an amount of the tax of the corporation as the stock held by the transferee bears to the entire stock of the corporation. This assertion we base upon two grounds. First, that the equity rules of the United States require the bringing in of all necessary and proper parties and in so doing it has been held that only a proportionate liability should be assessed; where only part of the stockholders have been brought in and no proper reason assigned for omitting the others; and, secondly, upon the ground that upon the facts found by the Commission of Internal Revenue no more than a proportionate liability can be assessed upon this particular taxpayer.

The findings of the Board of Tax Appeals (R. 16) show that the Commissioner did not even send to any of the other stockholders a notice that they would be held liable for the tax upon the company. No effort was made to fasten liability on anyone other than Mr. Phillips. No excuse was given nor found for failure to bring in the other stockholders. In a suit in equity to enforce this liability, there can be no doubt that the other stockholders would have been proper parties and that under Equity Rules 37 and 39 they would have been brought in unless it were shown that to attempt to bring them in would be futile or would oust the Court of jurisdiction. In the absence of the other stockholders and in the absence of excuse, no more than a pro rata recovery, it seems, would have been justified. *United States* v. *Armstrong*, 28 Fed. (2d) 227; *United States* v. *Snook*, 24 Fed.

(2d) 844; *Updike* v. *United States*, 8 Fed. (2d) 913. In the case last cited it was held:

> "All stockholders must be made parties defendant."

In *Wood* v. *Dummer*, Fed. Case 17944, Mr. Justice Story inclined toward the view that if less than all of the stockholders were brought in as proper parties without excuse for failure to bring in the others, only a proportionate liability could be assessed against those who were made defendants. The equity rules of the United States are not varied by any requirement of conformity to state procedure, but on the other hand are uniform, and if proportionate liability is the rule of the equity courts in one jurisdiction, it must be the rule throughout the United States.

Mr. Justice Marshall, in *United States* v. *Howland*, 4 Wheat. (17 U. S.) 108, said:

> "* * * As the courts of the United States have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

The same rule has been laid down in *Boyle* v. *Zacharie*, 6 Pet. (31 U. S.) 648; *Neves* v. *Scott*, 13 How. (54 U. S.) 267; *Noonan* v. *Lee*, 2 Black (67 U. S.) 499.

Furthermore, under the findings made by the Board of Tax Appeals, no more than a proportionate liability can in any case be assessed against Mr. Phillips. As stated at the outset of this brief, there is no finding as to

the amounts of the various distributions made to the stockholders of the Coombe Garment Company, but it is merely found that $68,558.35 was distributed between July 25th, 1919, and September 27th, 1919 (R. 15).. It is also found that the capital stock of the company was $50,000 (R. 14-15). We may, therefore, set up the balance sheet of the Coombe Garment Company as of July 25th, 1919, as follows:

Assets		Liabilities	
Cash and other property	$68,558.35	Tax	$ 9,306.36
		Capital stock	50,000.00
		Surplus	9,251.99
	$68,558.35		$68,558.35

When the first $9,251.99 was distributed among the stockholders of the Coombe Garment Company, it was a dividend entirely out of surplus and no possible liability could have been entailed. It is also true, under the rule laid down by this Court in *McDonald* v. *Williams*, 174 U. S. 397, that when the next $50,000 was distributed among the stockholders of the corporation, no liability accrued as against Mr. Phillips, for the company was still solvent. It was only when the last $9,306.36 was distributed that any liability in law or in equity arose as against Mr. Phillips. His liability would not exceed the amount which he received upon such distribution and since he was a 25% stockholder his liability would not be in excess of 25% of the last distribution, or $2,326.59.

By Section 602 of the Revenue Act of 1928, it was provided:

> "In proceedings before the Board the burden of proof shall be upon the Commissioner to show

> that a petitioner is liable as a transferee of property of a taxpayer but not to show that the taxpayer was liable for the tax."

The absence of any finding as to the dates when the various distributions were made indicates that the Commissioner did not bear the burden of proving at what time the Coombe Garment Company became insolvent and therefore which of the transfers imposed a liability upon the transferees. This proof of the time when insolvency occurred is recognized as difficult but necessary. Thus this Court said in *McDonald* v. *Williams*, 174 U. S. 397:

> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.
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> * * * * * * *
>
> Although no trust exists while a corporation is solvent, the fact which creates the trust is the insolvency and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved."

It follows that upon the facts found, there cannot be any liability upon any theory on the part of Mr. Phillips beyond his proportionate amount of the liability.

POINT VII.

The assessment was barred by the Pennsylvania Statute of Limitations.

The Pennsylvania statute regulating the liability of stockholders who receive the property of a corporation provides as follows:

> "But no stockholder shall be personally liable for payment of any debt contracted by any such corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders within six months after such debt shall have become due" (Act of 1874, Section 15). 1931 Corporation Manual, page 1231.

As we have seen under another point, the liability of a stockholder is governed by the law of the state of incorporation of the company. It is the well recognized law that a statutory liability which has appended to it a statutory period of limitations is conditioned by that period of limitations and that with the expiration of the period of limitations the liability itself is extinguished. *Davis* v. *Mills*, 194 U. S. 451; *The Harrisburg*, 119 U. S. 199; *Phillips* v. *Grand Trunk Western Railway*, 236 U. S. 662.

POINT VIII.

The petitioners have done nothing to waive their rights to question the constitutionality of Section 280 of the Revenue Act of 1926.

In the Circuit Court of Appeals the Government contended that the petitioners here, by appealing from the ruling of the Commissioner to the Board of Tax Appeals, had waived their right to question the constitutionality of Section 280. The argument was that one provision of Section 280 gave the right to appeal to the Board of Tax Appeals and therefore, by availing themselves of that right they had lost all right to question the constitutionality of any other provision of Section 280, including the provision which provided for the assessment of the liability itself.

We believe that no such proposition can be supported. There is no doubt that there is a rule with regard to the waiver of constitutionality of a statute where the party attacking its constitutionality has sought the benefit of the very portion of the statute attacked. The authorities relied upon by the Government are of that type.

In the case of *Great Falls* v. *Attorney-General,* 124 U. S. 581, the plaintiff commenced the action to restrain the Attorney-General from occupying the plaintiff's property taken pursuant to a condemnation statute passed by Congress. Prior to the commencement of that action the plaintiff filed a bill in the Court of Claims pursuant to the condemnation act to recover the value of his land taken in the condemnation proceedings. In the present action the plaintiff claimed

that the condemnation act was unconstitutional for the reason that the act provided that the Court of Claims should award damages to the plaintiff and did not contain a provision for an award of damages by a common law jury. The Court held that the plaintiff was estopped from raising the constitutional question because the plaintiff had waived his right to bring an action in tort by bringing the prior action on a contract implied in law. In other words, the claimant had availed himself in the Court of Claims of the very remedy which he thereafter sought to attack as unconstitutional. Viewed in another way, in the Court of Claims he had treated the title to the property as vested in the Government whereas in the latter proceeding he had sought to take an inconsistent position that the title was still in himself and that the Government should be ousted.

Similarly, in *Wall* v. *Parrott*, 244 U. S. 407, it was held that a stockholder who had availed himself of a statutory action to have his stock assessed in connection with a merger of two corporations could not thereafter attack the statute on the ground that the provision for assessment which he himself had invoked was unconstitutional.

So also, in *Booth Fisheries* v. *Industrial Commission*, 271 U. S. 208, it was held that where an employer had a right either to elect to be governed by workmen's compensation law or by common law liability, and he elected to be governed by the workmen's compensation law and invoked the remedies provided for by the law for the testing of his liability, he could not thereafter, being disappointed in the remedy given, attack the constitutionality of that remedy.

A mere summary of the holding in the foregoing cases clearly distinguishes them from the situation here present. It is true that petitioners appealed to the Board of Tax Appeals. But in so appealing they attacked the validity of the statute only in so far as it gave to the Commissioner the right to assess. No contention is made by the petitioners before this Court that the remedy for testing the constitutionality of the statute provided by the appeal to the Board of Tax Appeals was inadequate or unconstitutional. The remedy and the original liability are as quite separate and distinct as if they had been provided in two separate statutes. This point was recognized by the Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroller*, 36 Fed. (2d) 208, where the Court said:

> "To say that an act may impose an unconstitutional liability and forbid all judicial review except in one way, and then that one who appeals for review in the way provided for him thereby estops himself to deny the validity of the imposition, is, to our minds, an obvious solecism."

This Court has ruled that to involve such waiver, the party attacking the constitutionality of a statute, must have claimed property under or received a benefit from the very provision later attacked. *Frost* v. *Corporation Commission*, 278 U. S. 515; *Buck* v. *Kuykendall*, 267 U. S. 307; *Arizona* v. *Copper Queen Mining Co.*, 233 U. S. 87.

Moreover, the petitioners believe that it is not necessary for them to rely upon the provisions of Section 280 in order to justify their appeal to the Board of Tax Appeals. This Court in *United States* v. *Updike*, 281

U. S. 489, recognized that the transferee, for remedial purposes, is entitled to be placed in the position of a taxpayer. Likewise, the Court below recognized that although the statute does not expressly give the transferee a right to appeal from the Board of Tax Appeals to the Circuit Court of Appeals, none the less such right to appeal does lie by reason of the fact that the transferee is entitled, for remedial purposes, to be classed as a taxpayer. This being true, the petitioners would have been within their rights to appeal to the Board of Tax Appeals from the assessment made by the Commissioner even had Section 280 made no provision relative thereto.

Therefore, there is no waiver.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and the assessment against the petitioners' testator should be ordered vacated.

Respectfully submitted,

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Appendix No. 1.

STATE LAWS AFFECTING LIABILITY OF TRANSFEREE STOCKHOLDERS

STATE	PROVISION	STATUTE
CALIFORNIA	Pro rata liability irrespective of amount received.	Article 12, Section 3.
CONNECTICUT	Each stockholder voting for dissolution liable up to the aggregate amount distributed to all stockholders.	G. S. 3420.
DELAWARE	Each stockholder liable to creditors up to amount received in dissolution provided statutory notice was not published.	L. 1929, Chapter 135, Section 14.
IDAHO	Directors knowingly distributing prior to payment of debts are liable to creditors for full amount distributed. Stockholders' liability up to amount received arises only when no directors liable. Stockholders' liability is to corporation and not to creditors.	B. C. A., Section 21.
LOUISIANA	Directors knowingly distributing prior to payment of debts, are liable to creditors for full amount distributed. Stockholders' liability up to amount received, arises only when no directors are liable.	L. 1928, Act 250, Section 27.
MASSACHUSETTS	Joint and several liability up to amount received by respective stockholders.	G. L. Chapter 156, Section 35.
MICHIGAN	Joint and several liability up to amount received by respective stockholders. An action against stockholder must be founded on the Statute.	P. A. 1921, Act 84, P. 11, c. 3, Section 1
MINNESOTA	Joint and several liability up to amount received by respective stockholders.	Constitution, Article 10, Section 3, G. S. 7776.
MISSOURI	Full liability irrespective of amount received, with right of recovery over.	R. S. 9776.
NEVADA	Each stockholder liable to creditors up to amount received in dissolution provided statutory notice was not published.	R. L., Section 1144.
NEW JERSEY	Each stockholder liable to creditors up to amount received in dissolution provided statutory notice was not published.	C. S., Section 29.
NEW MEXICO	Stockholders jointly and severally liable up to amount received by them respectively only if statutory notice not published.	Statutes 32-134.

State	Provision	Statute
North Carolina	Full liability for taxes, costs and fees in dissolution.	Con. St. 1183.
Pennsylvania	Joint and several liability for all debts.	Act 1874, Sec. 39, Clause IV.
Vermont	Joint and several liability up to amount received by respective stockholders.	General Laws, Section 4940.
Virginia	Joint and several liability up to amount received by respective stockholders.	Code 3840.
West Virginia	Joint and several liability up to amount received, but liability is to corporation only and not to creditors.	Code, Chapter 31, Article 1, Section 14.
Wisconsin	If stockholder voted for distribution, then liable for the full amount of all debts; if stockholder did not vote for distribution, then jointly and severally liable for debts up to amount received by him.	Statutes, Sec. 182.08.

Appendix No. 2.

PROVISIONS FOR TIME LIMITATIONS

State	Statute	Period of Corporate Existence after Dissolution for Winding Up	Period of Limitations of Stockholders' Liability
Arkansas	Laws 1927, Act 250, Sec. 35	3 years	
Alabama	Code, Sec. 7069	5 years	
Connecticut	G. S., Sec. 3473		4 months for filing claims
Delaware	G. C. L., Sec. 40	3 years	
Florida	C. L. 1925, Sec. 45	3 years	
Idaho	B. C. A., Sec. 21		2 years
Indiana	G. C. A., Sections 42, 44	2 years	2 years
Louisiana	L. 1928, Act. 250, Sec. 27		2 years
Maine	R. S. Ch. 56, Sec. 82	3 years	1 year after transfer of stock
Massachusetts	G. L., Ch. 155, Sec. 51	3 years 60 days	
Mississippi	Code, Sec. 4171	3 years	
Michigan	Const. Art. XII, Sec. 3	3 years	
Minnesota	Const. Art. X, Sec. 3, G. S., Sec. 8023		18 months after dissolution
Montana	L. 1929, C. 117, Sec. 3	3 years	
Nevada	G. C. L., Sec. 65	3 years	
New Hampshire	P. L. Ch. 225, Sec. 76	3 years	
New York	S. C. L., Sec. 73		2 years
North Carolina	St. Sec. 1193	3 years	
Oregon	O. L., Sec. 6875	5 years	
Pennsylvania	Acts 1874, Sec. 15		6 months
Rhode Island	G. L. 1923, Ch. 248, Sec. 63	3 years	
South Carolina	Civil Code 1922, Sec. 4279 Act 166	2 years	
South Dakota	R. C., Sec. 8825		Creditors barred by decree of dissolution
Tennessee	C. C., Sec. 2071	5 years	
Texas	R. S., Art. 1389	3 years	
Vermont	G. L., Sec. 4956	3 years	
Virginia	Code, Sec. 3840 (unless receiver appointed)	3 years	